

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

JAMES JOHNSTON II,	)	NO. CV 12-5088-E
	)	
Plaintiff,	)	
	)	
v.	)	<b>MEMORANDUM OPINION</b>
	)	
CAROLYN W. COLVIN, ACTING	)	<b>AND ORDER OF REMAND</b>
COMMISSIONER OF SOCIAL SECURITY, <sup>1</sup>	)	
	)	
Defendant.	)	
_____	)	

Pursuant to sentence four of 42 U.S.C. section 405(g), IT IS  
HEREBY ORDERED that Plaintiff's and Defendant's motions for summary  
judgment are denied and this matter is remanded for further  
administrative action consistent with this Opinion.

///

///

///

---

<sup>1</sup> Carolyn W. Colvin, who became Acting Commissioner of  
Social Security as of February 14, 2013, is hereby substituted as  
Defendant in this matter. See Fed. R. Civ. P. 25(d)(1); 42  
U.S.C. § 405(g).

1 **PROCEEDINGS**

2

3 Plaintiff filed a complaint on June 14, 2012, seeking review of

4 the Commissioner's denial of disability benefits. The parties filed a

5 consent to proceed before a United States Magistrate Judge on April 4,

6 2013. Plaintiff filed a motion for summary judgment on January 30,

7 2013. Defendant filed a cross-motion for summary judgment on April 1,

8 2013. The Court has taken the motions under submission without oral

9 argument. See L.R. 7-15; "Minute Order," filed January 4, 2013.<sup>2</sup>

10

11 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**

12

13 Plaintiff asserts disability based on several alleged impairments

14 (Administrative Record ("A.R.") 47-59, 153-54). On July 28, 2010, an

15 Administrative Law Judge ("ALJ") heard testimony from Plaintiff, from

16 vocational expert Allan Ey, and from medical expert Dr. Samuel

17 Nafosi<sup>3</sup> (A.R. 43-66). Subsequent to the hearing, but before the

18 ALJ's decision, Plaintiff submitted voluminous additional medical

19 records, all of which the ALJ accepted and incorporated into the

20 Administrative Record (A.R. 312-523).

21

22 The ALJ found Plaintiff not disabled (A.R. 17-24). In doing so,

23 the ALJ expressly adopted the opinions of Dr. Nafosi regarding:

24

---

25 <sup>2</sup> This case was reassigned to the undersigned Magistrate

26 Judge by "Order of the Chief Magistrate Judge," filed January 2,

27 2013.

28 <sup>3</sup> The hearing transcript misspells this doctor's last

name as "Defusse" (A.R. 43, 60-61).

(1) the severity of Plaintiff's impairments; (2) the issue of whether any of Plaintiff's impairments met or equalled the Listings; and (3) the scope of Plaintiff's residual functional capacity (A.R. 19-23). The Appeals Council denied review (A.R. 1-3).

#### STANDARD OF REVIEW

Under 42 U.S.C. section 405(g), this Court reviews the Administration's decision to determine if: (1) the Administration's findings are supported by substantial evidence; and (2) the Administration used proper legal standards. See Carmickle v. Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue, 499 F.3d 1071, 1074 (9th Cir. 2007). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citation and quotations omitted); Widmark v. Barnhart, 454 F.3d 1063, 1067 (9th Cir. 2006).

#### DISCUSSION

##### **I. Absent Further Inquiry and Evaluation, the ALJ's Adoption of Dr. Nafosi's Opinions Cannot Stand.**

In adopting the opinions of Dr. Nafosi on critical issues in the disability analysis, the ALJ expressly relied on Dr. Nafosi's purported "board certified" status and the supposedly "comprehensive" nature of Dr. Nafosi's "review of the medical records" (A.R. 19). The ALJ's reliance was misplaced in both respects.

1 As the parties agree, Dr. Nafososi was not "board certified" at  
2 the time he formulated and expressed his opinions in this case. In  
3 Bogosian v. Astrue, 2012 WL 1956861, at \*3 (C.D. Cal. May 31, 2012)  
4 ("Bogosian"), another judge of this Court ruled that an ALJ's partial  
5 reliance on the purported "board certified" status of the same  
6 uncertified Dr. Nafososi required that the case "be remanded for a new  
7 hearing so that the ALJ can have an opportunity to properly consider  
8 the medical expert testimony in light of Dr. Nafososi's actual  
9 qualifications." The present case is legally indistinguishable from  
10 Bogosian. Although Bogosian is not binding herein, "[j]udges of the  
11 same district court customarily follow a previous decision of a  
12 brother judge upon the same question except in unusual or exceptional  
13 circumstances." Buna v. Pacific Far East Line, Inc., 441 F. Supp.  
14 1360, 1365 (N.D. Cal. 1977); see United States v. Anaya, 509 F. Supp.  
15 289, 293 (S.D. Fla. 1980), aff'd, 685 F.2d 1272 (11th Cir. 1982);  
16 accord Flores v. Stock, 715 F. Supp. 1468, 1471 (C.D. Cal. 1989). No  
17 unusual or exceptional circumstances here present themselves.

18  
19 The ALJ also erred by characterizing Dr. Nafososi's "review of the  
20 medical records" as "comprehensive." As Dr. Nafososi admitted, most of  
21 the medical records he reviewed were "over two years old" (A.R. 61).  
22 Further, Dr. Nafososi rendered his opinions without having any  
23 opportunity to review hundreds of pages of medical records that later  
24 were made part of the Administrative Record (A.R. 312-523). The ALJ  
25 thus mischaracterized the nature of Dr. Nafososi's review of the  
26 medical records, a potentially material mischaracterization under the  
27 circumstances of this case. See Rohan v. Barnhart, 306 F. Supp. 2d  
28 756, 769 (N.D. Ill. 2004) (ALJ's mischaracterization of medical

1 experts' testimony required reversal of administrative decision); see  
2 also Thelan v. Astrue, 2007 WL 3283651, at \*1 (9th Cir. Nov. 7, 2007)  
3 (ALJ's mischaracterization of the evidence required remand of  
4 administrative decision).

5  
6 **II. Remand, Rather than Reversal With a Directive for the Payment of**  
7 **Benefits, is Appropriate.**  
8

9 Because the circumstances of this case suggest that further  
10 administrative review could remedy the ALJ's errors, remand is  
11 appropriate. See McLeod v. Astrue, 640 F.3d 881, 888 (9th Cir. 2011);  
12 see generally INS v. Ventura, 537 U.S. 12, 16 (2002) (upon reversal of  
13 an administrative determination, the proper course is remand for  
14 additional agency investigation or explanation, except in rare  
15 circumstances).

16 ///

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 **CONCLUSION**

2

3 For all of the foregoing reasons,<sup>4</sup> Plaintiff's and Defendant's

4 motions for summary judgment are denied and this matter is remanded

5 for further administrative action consistent with this Opinion.

6

7 LET JUDGMENT BE ENTERED ACCORDINGLY.

8

9 DATED: April 8, 2013.

10

11 \_\_\_\_\_/S/\_\_\_\_\_

12 CHARLES F. EICK

13 UNITED STATES MAGISTRATE JUDGE

14

15

16

17

18

19

20

21

22

23

24

25

26 \_\_\_\_\_

27 <sup>4</sup> The Court has not reached any other issue raised by

28 Plaintiff except insofar as to determine that reversal with a  
directive for the payment of benefits would not be appropriate at  
this time.